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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

TRACY CARSON, JR. et al.,

Defendants and Appellants.

E052953

(Super.Ct.No. SWF019107)

OPINION

APPEAL from the Superior Court of Riverside County. Timothy F. Freer, Judge.

Affirmed with directions.

Kevin D. Sheehy, under appointment by the Court of Appeal, for Defendant and Appellant, Tracy Carson, Jr.

Anthony J. Dain, under appointment by the Court of Appeal, for Defendant and Appellant, Alfred Chadwick.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Gil Gonzalez and Jennifer A. Jadovitz, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendants, Tracy Carson, Jr., and Alfred Chadwick of first degree murder (Pen. Code, § 187, subd. (a)),<sup>1</sup> four counts of second degree robbery (§ 211), five counts of false imprisonment (§ 236), and felony evasion (Veh. Code, § 2800.2). Both were sentenced to prison for five years, eight months plus 25 years to life and appeal, claiming the jury was misinstructed and they were incorrectly sentenced. We reject their contentions and affirm, while directing the trial court to correct a number of errors in both of their determinate abstracts of judgment.

### **FACTS**

On November 29, 2006, defendants and a co-perpetrator robbed four employees of a bank in Hemet, taking approximately \$37,000, and they placed the employees and two customers in the bank's vault. Alerted by phone calls from the bank, the police arrived and watched the three come out of the bank, get into a Chevy Tahoe SUV and take off. The police attempted to stop the Tahoe, were forced to give chase and the Tahoe drove at high speeds and recklessly, running several stop signs in a residential area, before hitting another car, then a tree. The defendant's co-perpetrator, who was seated in the back seat of the Tahoe, sustained injuries in the crash that resulted in his death months after the crimes.

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

## ISSUES AND DISCUSSION

### 1. *Jury Instructions*

#### a. *On Involuntary Manslaughter*

The jury was instructed that “defendant is charged with . . . first degree murder, under th[e] theory [of felony murder].” The jury was further told by the trial court, “I have instructed you on the felony murder rule. . . . Another way a defendant may be found criminally liable for murder in violation of Penal Code section 187 is as follows: [¶] . . . [T]he People must prove that: [¶] 1. The defendant committed an act that caused the death of another person; [¶] AND [¶] 2. When the defendant acted, he had a state of mind called malice aforethought. [¶] There are two kinds of malice aforethought, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder. [¶] The defendant acted with express malice if he unlawfully intended to kill. [¶] The defendant acted with implied malice if: [¶] 1. He intentionally committed an act; [¶] 2. The natural consequences of the act were dangerous to human life; [¶] 3. At the time he acted, he knew his act was dangerous to human life; [¶] AND [¶] 4. He deliberately acted with conscious disregard for human life. [¶] . . . [¶] . . . Implied malice murder is second degree murder . . . .<sup>[2]</sup> [¶] The People have the burden of proving beyond a reasonable doubt that the killing was first-degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first-degree murder. [¶] . . . [¶] You may consider these different kinds of

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<sup>2</sup> Both defendants requested instructions on second degree murder.

homicide[, first-degree murder and second-degree murder]. But I cannot accept a verdict of guilty of a lesser crime only if all of you have found the defendant not guilty of the greater crime. . . . ¶ . . . ¶ . . . If all of you agree that the defendant is not guilty of first-degree murder but also agree that the defendant is guilty of second-degree murder, complete and sign the form for . . . guilty of second-degree murder. Do not complete and sign any other verdict forms for that count.” The jury was instructed that second degree murder was a lesser offense to murder in the first degree.

There was absolutely no evidence whatsoever that either defendant intended to kill their co-perpetrator, thus taking express malice murder off the table, leaving only implied malice second degree murder as an option to the charged first degree murder, just as the jury was instructed. The People briefly addressed this option during their argument to the jury, thusly, “You were read an instruction about . . . implied malice murder. . . . [I]t doesn’t include the felony murder law. This is based on conduct of the defendants . . . . [T]his is a lesser offense to first-degree murder. This is second degree murder. And element one . . . is . . . the defendant committed an act that caused the death of another person. ¶ Similar to . . . the fact that [the co-perpetrator] injured himself as a result of the wanton disregard and dangerous manner in which the two [defendants] escaped from the bank. . . . ¶ . . . The act was reckless driving of the vehicle that caused the death of [the co-perpetrator]. . . . ¶ [Element] 2: When the defendant acted, he had a state of mind called malice aforethought. . . . It’s a fancy legal word for what’s going on up here. His conduct alone can cause the death of another person and be murder. ¶ The manner in which he acted showed his mental state. . . . [B]oth of the [defendants] . . . recklessly,

without abandon, without consideration for life, drove that [Tahoe] . . . . The natural consequences of the act were dangerous to human life. . . . [¶] [At t]he time he acted he knew the act was dangerous to human life. . . . [¶] And, . . . he deliberately acted with conscious disregard for human life . . . [¶] . . . [¶] So, we have implied malice here. We have second-degree murder, hands down, but that's not what we are here for. We are here for what they are actually responsible for. Based on their conduct, [the co-perpetrator] suffered a fatal injury, which means we have no less than second-degree murder. You cannot find the[m] guilty of any crime of murder less than second-degree . . . . And I implore upon you that you shouldn't even go into second-degree murder because there is substantial evidence regarding first." The People argued that the robberies continued until the Tahoe hit the tree and the fatal injury to the co-perpetrator was inflicted during that period and the fatal injury and any one of the robberies were part of one continuous transaction.

Chadwick conceded to the jury that he was guilty of all the charged robberies and false imprisonments and the felony evading charge. However, as to the charged murder, he argued, "[I]f you find that this robbery was [not] an ongoing situation, that they are separate acts and . . . that the death did not occur during the robbery itself, but[,] . . . instead, during the evading, you have an implied malice murder. You have second degree." Chadwick argued that this was the case. He also argued that the position taken by Carson's attorney, that the possibility that the co-perpetrator died of sepsis from not having his breathing or feeding tubes properly maintained while in a rehabilitation facility following the collision, thus rendering both defendants not guilty of

either first or second degree murder, had “some legs” but would not be an argument he could credibly advance on behalf of Chadwick.

Carson conceded to the jury that he was involved in the robberies that resulted in the people being put in the vault, but he attacked the opinion of the pathologist that the co-perpetrator died from the injuries he suffered in the collision, arguing, instead, that the latter died from an infection caused by his tube(s) not being properly cleaned while he was in the rehabilitation facility. This, Carson argued, was an intervening cause of the co-perpetrator’s death, which absolved Carson of liability both for felony murder, based on the robberies, and second degree murder, based on the reckless driving of the Tahoe.

The foregoing arguments crystallized the issue the jury was to decide in terms of the charged murder—if the jury determined that the act that caused the co-perpetrator to die was part of the robbery, it was to convict defendants of felony murder. If the jury determined that the robbery was over when this act occurred, it was to decide whether, as Chadwick argued, that it occurred during the evading, leaving defendants guilty of second degree murder, or, as Carson argued, that the co-perpetrator died as a result of poor medical treatment, leaving defendants not guilty of anything.

It is with this background that we address defendants’ claims that the jury should have been instructed on involuntary manslaughter and the failure to do so requires reversal of their convictions.

The amended information charged that defendants “willfully, unlawfully, and with deliberation, premeditation, and malice aforethought murder[ed]” the co-perpetrator. At

the end of the evidentiary portion of trial and while discussing jury instructions, the following colloquy occurred between the trial court and the prosecutor,

“[THE PROSECUTOR]: . . . Your [h]onor asked me yesterday to amend the information to reflect [c]ount 1, a felony murder charge. After speaking with the filing department in our office, we don’t have a template or proposed pleading for that charge. I then also was concerned about the fact that we would be filing an amendment as to one count and keeping counts the [c]ourt had already dismissed based on an 1811 motion, but more so on modifying the murder charge. [¶] And I spoke with our chief appellate attorney in our office. And she basically instructed me that because we’re a notice pleading state, and . . . the fact that the jury is not going to see the Information during deliberation, it could invite error on an appeal. We made it clear to the jury from the outset this is a felony murder case and my verdict forms will reflect the fact that there was no premeditation and deliberation in their finding. It’s basically first-degree murder based on the allegations of [c]ount 1 on the amended Information.

“[THE COURT]: All right.

“[THE PROSECUTOR]: So based on that Information and the recommendation of the appellate division, I did not amend the information as the [c]ourt requested. I apologize. But I think, just so we don’t invite error, I want to rely upon . . . Fitzpatrick’s opinion on that. I don’t know if it’s accurate or not, but she knows a little more about it than I do.

“[THE COURT]: All right.

“[THE PROSECUTOR]: She gave me a couple cases, if the [c]ourt wants.

“[THE COURT]: No, that’s not necessary. The [c]ourt will state and indicate for the record that [c]ount 1 has the language in the Information of deliberation, premeditation and malice aforethought. It does charge both the defendants with murder. The district attorney has made it clear that he is proceeding under a felony murder theory. It has been clear. It is first-degree murder. Counsel have been put on notice they are not objecting to that conduct. [¶] And that’s not the conduct but to the – the notification requirement in terms of the pleading. [¶] So to . . . make sure that there is no error on – by the Court of Appeals, that’s attributed anyway to this [c]ourt or to you, [the prosecutor], I’ll make it clear at this time that both the defendants have been placed on notice that we are proceeding under the felony murder rule. You made that clear. It’s just on the amended Information. It seems inconsistent with proceeding under a felony murder rule and then having the . . . [‘]with deliberation, premeditation and malice aforethought[’] language there but –

“[THE PROSECUTOR]: And I agree with the [c]ourt, and a lot of our pleading sometimes plead—

“[THE COURT]: Indicate conjunctive.

“[THE PROSECUTOR]: . . . in the conjunctive when they shouldn’t, and it stays that way regardless of how the verdicts come back. I do have to state that even though no notice is required regarding the actual charge, the theory does not have to be disclosed to the defense. That is something that –

“[THE COURT]: I understand.

“[THE PROSECUTOR]: So I just wanted to make – I do agree with the [c]ourt. *We just don’t have the mechanism or policy to proceed that way.*”

The defendants correctly point out that involuntary manslaughter is a lesser included offense to murder, and the trial court has a sua sponte duty to instruct on involuntary manslaughter when it is supported by substantial evidence. (*People v. Lewis* (2001) 25 Cal.4th 610, 645.) Defendants also correctly point out that involuntary manslaughter may be predicated on the commission of a noninherently dangerous felony if committed without due caution and circumspection. (*People v. Burroughs* (1984) 35 Cal.3d 824, 835, 836, disapproved on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89.) Finally, defendants correctly point out a violation of Vehicle Code section 2800.2—felony evasion—is not an inherently dangerous felony (*People v. Howard* (2005) 34 Cal.4th 1129, 1132, 1138-1139).

The People counter that because it was clear that the prosecution proceeded at trial on the theory of felony-murder and defense counsel was on notice of this and did not object “the information was effectively orally amended such that the charge . . . was felony murder.” The parties appear to agree that involuntary manslaughter is not a lesser included offense of felony murder. In their briefs, defendants concede that “without objection by the defense, the prosecutor elected to proceed exclusively upon a theory of felony murder based on robbery for the purposes of first degree murder.” However, the defendants assert that the above-quoted colloquy between the prosecutor and the trial court constituted an express refusal by the former to amend the information to allege felony murder rather than murder, therefore, they assert, the sua sponte obligation to

instruct on involuntary manslaughter as a lesser included offense of murder, on the theory that the death occurred during the evasion arose. Both sides rely on *People v. Anderson* (2006) 141 Cal.App.4th 430 (*Anderson*).

In *Anderson*, the defendant was charged initially with murder and, at the end of the evidentiary portion of trial, felony-murder was *added* to the information. (*Anderson*, *supra*, 141 Cal.App.4th at p. 435.) However, the defendant was never charged with the predicate offense for the felony murder. (*Id.* at p. 445.) The jury was instructed only as to felony murder. (*Id.* at p. 442.) On appeal, the defendant argued that the trial court had a sua sponte duty to instruct, inter alia, on first and second degree murder and voluntary manslaughter. (*Id.* at p. 442.)

The *Anderson* court noted, “The scope of the sua sponte duty to instruct [on lesser included offenses] is determined from the charges and facts alleged in the accusatory pleading: ‘[T]he rule ensures that the jury *will be exposed to the full range of verdict options* which, by operation of law and *with full notice to both parties*, are presented in the *accusatory pleading itself* and are thus closely and openly connected to the case. In this context, the rule prevents either party, whether by design or inadvertence, from forcing *an all-or-nothing choice between conviction of the stated offense on the one hand, or complete acquittal on the other. . . .*’ [Citations.] [¶] . . . [¶] . . . It has been held consistently that the scope of the sua sponte duty to instruct is determined by the charge contained ‘in *the [information] itself*.’ [Citations.] This is so because the role of the [information] is to *provide notice to the defendant of the charges* that he or she can anticipate being proved at trial. ‘When the [information] alleges a particular offense, it

thereby demonstrates the prosecution’s intent to prove all the elements of any lesser necessarily included offense.’ [Citation.] . . . Because second degree murder and voluntary manslaughter are lesser included offenses of the offense charged [(murder)], defendant was on notice that she might be convicted of that crime or any of its lesser included offenses—and, by the same token, that she could anticipate instructions on these lesser included offense if they were supported by substantial evidence. [¶] . . . Th[e] amendment [of the information] should not be permitted to alter the expectations created by the original information. It is not clear . . . that the felony-murder charge supplanted the murder charge . . . , since the trial court referred to felony murder as an ‘added’ charge. If the original charge of murder remained, the sua sponte duty to instruct as to lesser offenses did as well. Even if felony murder had been intended to replace the existing charge, an amendment made at the close of evidence does not satisfy *the notice function* that underpins the duty of sua sponte instruction. [Citation.] Having established the expectation that instruction on lesser included offenses of murder would be given, if supported by the evidence, the prosecution could not defeat that expectation by amendment after the close of evidence.” (*Anderson, supra*, 141 Cal.App.4th at pp. 443, 445-446, third and fifth italics original.)

We conclude that *Anderson* is distinguishable from this case in its two important aspects—notice and leaving the jury with an all or nothing choice. As to the first, as *Anderson* notes, the reason for holding the prosecution to the statement of the charge in the information is because it gives the defendant notice that it and its lesser included offense must be defended against. Here, the prosecution, *throughout trial* and without

objection from the defense, proceeded *solely* on a felony-murder theory of first degree murder. Unlike *Anderson*, defendants had no reason to anticipate having to defend against involuntary manslaughter or having the jury instructed on it.

As to giving the jury an all or nothing choice, *Anderson* is again distinguishable from this case. Chadwick, no doubt, requested an instruction on second degree murder to dovetail with his argument that the robbery had ended before the act that resulted in the death of the co-perpetrator occurred.<sup>3</sup> In convicting defendant of first degree murder, the jury necessarily rejected the notion that the robbery had ended at that point. Also unlike *Anderson*, this was not a case where the jury was left with an all-or-nothing option, which the rule on sua sponte instructions on lesser included offenses is designed to avoid. This jury was called upon to determine when the act that caused the co-perpetrator's death occurred and it determined that it occurred during the course of at least one of the robberies. For this reason also, we would conclude that even if it was error not to give instructions on involuntary manslaughter, the error was harmless because if the jurors had been given the option of convicting defendants of this crime because the act occurred during the evasion and not during the robbery, they would have rejected it (see *People v. Watson* (1956) 46 Cal.2d 818, 836).

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<sup>3</sup> Thus, we disagree with the People that it was error to give this instruction or giving the jury the option of convicting defendants of second degree implied malice murder was a windfall to them.

b. *On Murder*

The jury was instructed, “If you decide that the defendant has committed murder, you must decide whether it is murder of the first or second degree. The defendant has been prosecuted for first-degree murder under the theory of felony murder. I have instructed you on the felony murder rule. . . . [¶] *You may not find the defendant guilty of first degree murder unless all of you agree that the People have proved that the defendant committed murder. Express and implied malice murder is defined in CALCRIM 520. Implied malice murder is second degree murder . . . .* [¶] The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime.<sup>4</sup> If the People have not met this burden, you must find the defendant not guilty of first degree murder.”

Defendants, here, for the first time, claim that the italicized portion of the above-quoted instruction should not have been given as it is appropriate only where there are multiple theories of first degree murder alleged. We agree that certain portions of the italicized sentences added nothing to the jury’s understanding of what it needed to determine in this case and should have been omitted, but we detect no prejudice arising from those portions. We reject the defendant’s assertion that the jurors might have interpreted the first sentence of the italicized portion as permitting them to convict defendant of first degree murder if the People proved beyond a reasonable doubt that defendant committed murder. This flies in the face of all the other instructions given the

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<sup>4</sup> As stated before, the jury had already been informed that second degree murder was a lesser crime of first degree felony murder.

jury, which we have either replicated or summarized in this opinion, and the jurors had been instructed to “consider [all of the instructions] together. There is no way this jury could have believed, based on this sentence alone, that all they had to do to find defendant guilty of first degree felony murder was to determine that the People had proven beyond a reasonable doubt either first degree felony murder *or* second degree implied malice murder. We agree with the defendants that any reference to express malice murder in the second italicized sentence should have been omitted, as it had no relevance whatsoever to this case.<sup>5</sup> However, the jury was instructed to ignore any portion of the instructions that did not apply and we must presume that it followed this directive. Another portion of the italicized instruction, i.e., that implied malice murder is second degree murder, was crucial to the jury’s understanding and was appropriate. Finally, defendants contend that the trial court erroneously omitting giving the last sentence of the standard version of the italicized portion of the instruction quoted above, which is, “All other murders are of the second degree.” Of course, this sentence only makes sense in the context of there being more than one theory of first degree murder, which was not the case here. To the extent that defendants are suggesting that because of the omission of this sentence, the jury did not understand that if defendants were not guilty of first degree felony murder, but were liable for murder, it was for second degree murder, other instructions given clearly conveyed this concept.

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<sup>5</sup> The reference to it in CALCRIM No. 520 should also have been omitted, but the defendants do not appear here to object to it.

## 2. Sentence

### a. Felony Evasion

The sentencing court stayed the terms for all the robberies pursuant to section 654 because each was, arguably, the underlying felony for the felony murder. However, the sentencing court concluded that the felony evasion was a separate and distinct act, which should not be stayed under section 654, and imposed a concurrent term for it. Defendants here contend that this later conclusion is in error because there is no substantial evidence to support a finding that they harbored an intent and objective for the evasion which was separate from their intent and objective for the felony murder, *even though* the crimes were part of one indivisible course of conduct (see *People v. Harrison* (1989) 48 Cal.3d 321, 335). Defendants correctly point out that in order to convict them of felony murder, the jury had to conclude that the act causing the death of the co-perpetrator and the robberies were, 1) part of one continuous transaction and, 2) occurred during the course of the robbery. However, this does not address the issue of intent and objective.

In support of their assertion that section 654 applies, defendants cite *People v. Perry* (2007) 154 Cal.App.4th 1521 (*Perry*), which, ironically, contains a discussion which supports the People's position. Therein, the appellate court noted, "There . . . appears to be a general distinction between cases addressing convictions of burglary and robbery and cases addressing burglary and assault convictions." (*Id.* at p. 1526.) *Perry* goes on to cite cases in which section 654 was applied where the defendant was convicted of burglary for taking something and robbery for resisting efforts by the victim to stop the thief and in which section 654 was not applied where the defendant was

convicted of burglary for taking something and assault for resisting efforts by the victim to stop the thief. (*Ibid.*) The *Perry* court said, “Although each case necessarily turns upon its own particular facts, the apparent distinction between the[se] cases . . . may be explained by the difference between the intent necessarily reflected in conviction of robbery and assault. Assault reflects an intent to perform an act that, by its nature, will probably and directly result in the application of physical force to another person.

[Citation.] Robbery, while involving the use of force or fear, reflects an intent to deprive the victim of property. Accordingly, a conviction of assault committed during an escape with property taken during a burglary reflects, in essence, an intent to apply, [or to] attempt to apply, or [to] threaten to apply force to a person, rather [than] an intent to steal property. The objective of such an assault generally will be to deter, interrupt, or put a stop to a pursuit or other effort to capture the defendant and any property taken during the burglary. However, if property is taken during a burglary and a robbery pertaining to the same property is committed during the escape, the objective is still essentially to steal the property. Admittedly, an additional objective of preventing the victim or another person from taking back the property generally will exist, but may be incidental to, rather than independent of, the objective of stealing the property.<sup>[6]</sup> . . . At some point, the degree of

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<sup>6</sup> In *People v. Guzman* (1996) 45 Cal.App.4th 1023, 1028 which the defendants cite in support of their position, the appellate court held that section 654 applied to a robbery that resulted when burglars were confronted by the owner of the item they had stolen and they beat him up, thus committing a robbery. However, *Guzman* was based solely on a factor explicitly rejected in *Perry*, i.e., that the burglary was still on-going when the beating occurred. (*Guzman*, at pp. 1023, 1028.) In *People v. Niles* (1964) 227 Cal.App.2d 749, 753, also cited by defendants, the defendant entered the victim’s room

[footnote continued on next page]

force or violence used or threatened may evince ‘a different and more sinister goal than mere commission of the original crime,’ i.e., an independent objective warranting multiple punishment.<sup>[7]</sup> [Citation.] [¶] . . . [¶] The trial court erred by focusing on the completion of the burglary [in finding that the subsequent robbery had a separate intent]. *The moment at which a defendant committed all of the elements of an offense is immaterial in applying Penal Code section 654. Similarly, whether an offense might be deemed ongoing for other purposes, such as application of the felony-murder rule, is irrelevant in this context.* [Citation.]<sup>[8]</sup> The court must instead consider whether the offenses were part of an indivisible course of conduct, whether the defendant acted according to a single objective or multiple independent objectives, and *whether the defendant committed violent crimes against different victims.*” (*Id.* at pp. 1526-1527, italics added.) Thus, defendants’ reliance solely on the facts that the felony murder and the act causing the death, which occurred during the evasion, were part of one continuous transaction and the act causing the death occurred during the course of the robbery is, under *Perry*, misplaced. Rather, the existence of more than one intent and objective and

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[footnote continued from previous page]

and took his clothes, the victim retrieved his clothes from defendant, defendant threatened to shoot the victim, the two began struggling and defendant hit the victim. The appellate court concluded that section 654 applied because the assault and burglary comprised an indivisible transaction in which the assault was merely incidental to the objective of burglarizing the victim’s room. (*Niles*, at p. 755.) However, *Niles* did not have the benefit of the development of case law in this area discussed in *Perry*.

<sup>7</sup> Ironically, the case the People cited in support of their argument is cited by the *Perry* court at this point. (*People v. Nguyen* (1988) 204 Cal.App.3d 181, 191 (*Nguyen*).)

<sup>8</sup> See footnote six, *ante*, page 16.

the fact that the robberies involved the bank employees while the felony murder involved the co-perpetrator is dispositive.

In *People v. Nguyen* (1988) 204 Cal.App.3d 181, Division One of this court held that section 654 did not prohibit imposing sentences for a robbery and the attempted murder of the victim of the robbery, thusly, “While Nguyen remained at the store’s till, his crime partner took the victim into a back room, relieved him of his valuables, and then forced him to lie on the floor in an obvious attempt to forestall any resistance. Only after the clerk assumed that position did Nguyen’s accomplice shoot him. [¶] This act constituted an example of gratuitous violence against a helpless and unresisting victim which has traditionally been viewed as not ‘incidental’ to robbery for purposes of Penal Code section 654. [Citations.] [¶] The defense nevertheless argues Penal Code section 654 bars multiple sentences here because the facts suggest the clerk was shot in order to . . . facilitate the assailants’ escape. Perhaps; but *at some point the means to achieve an objective may become so extreme they can no longer be termed ‘incidental’ and must be considered to express a different and a more sinister goal than mere successful commission of the original crime.* [¶] We should not lose sight of the purpose underlying section 654, which is ‘to insure that a defendant’s punishment will be commensurate with his culpability.’ [Citations.]” (*Id.* at pp. 190-191, italics added.)

The intent and objective for the felony murder was to take money from the bank. The intent and objective of the felony evasion was to escape capture and retain the stolen money. We view the felony evasion here as more analogous to the assaults committed by

thieves in order to retain the items they have stolen addressed in *Perry* and the gratuitous violence addressed in *Nguyen*.

Finally, in *People v. Wynn* (2010) 184 Cal.App.4th 1210, the defendant shoplifted cigarettes from a store, was confronted by a loss prevention officer, threw the cigarettes down and used nunchaku on the officer. The appellate court concluded that “substantial evidence supports a finding that Wynn’s objective during the *burglary* was to obtain the cigarettes, but his objective during the assault was to avoid being arrested for the theft.” (*Id.* at p. 1216.) Similarly, here, the defendants’ intent during the evasion was, in part, to escape capture by the pursuing police. Moreover, the act which resulted in the death of the co-perpetrator was so extreme that it cannot be considered incidental to the robberies.

The sentencing court did not err in imposing sentence on both the felony murder and the evasion.

#### **DISPOSITION**

The trial court is directed to amend the determinate abstract of judgment for Carson showing, on page two, that the total sentence is five years, not seven, as the abstract currently states, the “total time on attached page” on page one is five years, not seven, as the abstract currently states and the “total time excluding county jail term” is five years, eight months, not seven years, eight months, as the abstract currently states. The trial court is directed to amend the first page of Chadwick’s determinate abstract of judgment to show that the term for count eight is one-third consecutive non-violent and the “total time on attached pages” is two years, not 25 years to life, as the abstract currently states, and, on page two, to indicate that counts 9, 10 and 11 are one-third

consecutive non-violent, not violent as the abstract currently states, that the term for count 14 is the midterm and it was run concurrently and that the total term and “total time imposed on this attachment page” is two years and not four, as the abstract currently states. In all other respects, the judgments are affirmed.

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RAMIREZ  
P.J.

We concur:

KING  
J.

MILLER  
J.